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No. 84-613

In The

Supreme Court of the United States

October Term, 1984

EMI LIMITED,

Petitioner,

vs.

WILLIAM BENNETT, and ERNEST J. DRONENBURG, JR., Successor; KENNETH CORY; RICHARD SILBERMAN, and MARY ANN GRAVES, Successor; and MARTIN HUFF and GERALD H. GOLDBERG, Successor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN K. VAN DE KAMP
Attorney General

EDWARD P. HOLLINGSHEAD
Deputy Attorney General
COUNSEL OF RECORD

CHARLES C. KOBAYASHI
Deputy Attorney General

1515 K Street, Suite 511
Sacramento, California 95814
Telephone: (916) 324-5154

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

Whether petitioner has standing under article III of the Constitution to bring this action.

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I

JURISDICTION

The technical jurisdictional requirements appear to be set forth adequately in the petition except that petitioner has failed to establish its standing to sue. It also should be pointed out that this is the third time that petitioner has filed very similar petitions for writ of certiorari on the same basic issue, namely, whether petitioner has standing to sue. (*EMI Limited v. William Bennett, et al.*, No. 81-1088, cert. den. (1982) — U.S. —; *EMI Limited v. Wil-*

liam Bennett, et al., No. 82-903, cert. den. (1983) — U.S. —.) This petition also raises the identical question of standing that was raised in two earlier petitons for writ of certiorari which were denied by this Court, namely, *Alcan Aluminium, Ltd. v. Franchise Tax Bd.* (S.D.N.Y. 1983) 558 F. Supp. 624, aff'd. mem. 2d Cir., cert. den. (1983) — U.S. — [79 L.Ed.2d 170], and *Shell Petroleum, N.V. v. Graves* (9th Cir. 1982) 709 F.2d 593, cert. den. (1983) — U.S. — [78 L.Ed.2d 717].)

II

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, article III, section 3 (standing of plaintiff).

III

STATEMENT OF THE CASE

A. Prefatory Statement

First, in its extensive statement of the case, petitioner has failed to emphasize a crucial fact, namely, that petitioner's wholly owned California subsidiary, Capitol Industries-EMI, Inc. (hereafter referred to as "Capitol"), has pending before the California State Board of Equalization its appeal of the Franchise Tax Board ("FTB") assessment of additional tax based on the unitary method. Capitol has made this appeal without payment of the assessed tax. If Capitol prevails in its administrative action, the unitary assessment will be a nullity and the FTB will not be able to appeal such an adverse decision to the court. But even if Capitol loses on its administrative action, it can still pay the tax and file a suit for refund in the Cali-

fornia superior court like any other taxpayer. A judicial decision favorable to Capitol will avoid the constitutional questions raised here by petitioner.

Second, petitioner spends an extraordinary amount of time talking about the alleged request by FTB from EMI for certain information pertaining to EMI. However, EMI's discussion of this point is completely inappropriate because the Ninth Circuit in the action below found that "The FTB is making demands for information only from Capitol." (*EMI, Limited v. William Bennett, et al.*, July 23, 1984, 9th Cir., No. 82-4611, as cited in petitioner's Appendix A-1, A-6.)[1] This continued reliance by the petitioner on a non-existent fact vividly illustrates the total lack of merit in petitioner's petition.

B. Relevant Facts

Petitioner (hereafter "EMI") is a British corporation which owns substantially all the stock of Capitol, which is a domestic corporation doing business in California.

The FTB is the agency of the State of California administering the income and franchise tax laws of that state.

The named defendants are members of the FTB and the executive officer of the FTB.

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1. The court reviewed the motion to dismiss on a de novo basis as shown by its statement that "Standing 'is the threshhold question in every federal case, determining the power of the court to entertain the suit.' [Citations.] Because standing is a jurisdictional question, this Court reviews *de novo*. [Citation.]" (*Id.* at A-5). The FTB had erroneously sent one demand letter to EMI in 1975. However, FTB sent no further demands to EMI. Thus, the Ninth Circuit Court found that there was in effect no demand for information by FTB upon EMI.

FTB assessed a tax against *Capitol, not EMI,* under the unitary method.

FTB assessed no tax, did not audit and took no action against EMI, which is outside the jurisdiction of the FTB.

On August 15, 1979, EMI and Capitol filed separate lawsuits in the United States District Court against the named defendants for injunctive and declaratory relief to enjoin the said defendants from assessing a tax against Capitol.

On February 4, 1980, the District Court ordered the lawsuits of both EMI and Capitol dismissed by granting summary judgment to the named defendants; thereafter, both EMI and Capitol appealed to the Court of Appeals, Ninth Circuit.

On February 16, 1982, the Ninth Circuit Court of Appeals remanded the two cases to the district court. (681 F.2d 1107.)

Thereupon, the district court entered an order dismissing Capitol's lawsuit in accordance with the Court of Appeal's directions. Capitol then filed a petition for certiorari (No. 82-688) with this Court, which denied it on December 13, 1982. Thus, the order dismissing Capitol's lawsuit is now final.

In the case of EMI's action, EMI filed a motion for summary judgment in July 1982 and the named defendants filed a motion to dismiss EMI's action on the ground that EMI did not have standing to sue.

On October 8, 1982, the district court granted the named defendants' motion and ordered EMI's action dismissed. (*Capitol Industries-EMI, Inc. v. Bennett,* cert.

denied (1983) — U.S. —, 75 L.Ed.2d 435.) Then on July 23, 1984, the Ninth Circuit Court of Appeals affirmed the dismissal of EMI's action.

ARGUMENT

I

EMI Has No Standing Under Article III Of The United States Constitution

A. Introduction

The essence of EMI's action is found in its statement of the case where it asserts that the named defendants have repeatedly demanded information from EMI and Capitol and that they have unlawfully sought to assess additional taxes against Capitol on the unitary method. EMI has no quarrel with FTB's requiring Capitol to file a unitary return on a domestic basis. Obviously the demand for information issue is an illusory one which only exists in EMI's imagination. After all the court below on a de novo review confirmed the district court finding that "The FTB is making demands for information only from Capitol." (EMI's Petn. App. A-6.) As far as the issue of FTB's assessment against Capitol is concerned, it is nothing more than an egregious attempt by EMI to prevent FTB from lawfully including the unitary portion of EMI's income in the tax formula to determine the amount of Capitol's income which is properly apportionable to California under the unitary method. What makes EMI's action particularly egregious is its filing the instant action when its virtually wholly owned subsidiary, Capitol, is still in the process of exhausting its administrative remedies and has neither paid the assessed tax nor has sought to exercise its judicial remedies in California.

B. The Undisputed Facts Unequivocally Demonstrate That EMI Has No Standing To Sue

On the basis of the undisputed facts, it is clear that EMI has no standing to sue. The named defendants have not demanded any information from EMI. Nor have they assessed or sought to assess any tax against EMI; nor have they sought to take any action against EMI, which is a foreign corporation that does no business in the United States and is not a California taxpayer. EMI is only a shareholder of Capitol, the corporation which does business in California against which the FTB assessed a tax measured by the unitary method. Because EMI has no real basis to support its standing argument, it relies on the speculative contention that, as a shareholder of Capitol, it will suffer the possible loss of diminished dividend income or possible diminution in the value of its shares of Capitol. The premise of these contentions is fallacious.

EMI is separate and independent from Capitol, the corporation against which the FTB assessed the tax. EMI occupies the status of a shareholder of Capitol. Obviously as a shareholder, EMI has no inherent right to receive anything from Capitol. It certainly does not have the right to receive dividends, whether monthly, quarterly, annually or in any other form. In fact, as a shareholder of Capitol, EMI owns neither the corporate property nor the corporate earnings of Capitol; it simply has an expectancy in each. This well-established proposition was stated by the United States Supreme Court in these words:

> "The owner of the shares of stock in a company is not the owner of the corporation's property. He has a right to his share in the earnings of the corporation, as they may be declared in dividends, arising from the use of all its property. In the dissolution of the corporation he may take his proportionate share in what is left, after all the debts of the corporation

have been paid and the assets are divided in accordance with the law of its creation. But he does not own the corporate property." (*Rhode Island Hospital Trust Co. v. Doughton* (1926) 270 U.S. 69, 81.)

Furthermore, the threatened injury to EMI is too remote and speculative to meet standing requirements. As discussed above, EMI as a stockholder has no inherent right to receive anything from Capitol. The expectant interest which EMI has in the earnings of Capitol does not entitle it to receive dividends, whether monthly, quarterly, annually, or in any other form on its stockholdings. Moreover, a corporation's declaration of dividends generally is dependent not on earnings alone, but also on such factors as corporate expansion plans, the need to increase cash reserves and the like. Thus, whether EMI will be adversely affected by proposed tax assessments against Capitol—or benefited if such assessments are held invalid—is entirely a matter of conjecture. Even if it should be ruled that the unitary tax as applied to Capitol is unconstitutional, there is absolutely no assurance that EMI will realize any concrete benefit. At this point, there are many possibilities, but one thing is certain: it is anyone's guess whether EMI will be out-of-pocket if the assessments against Capitol are sustained by the California state courts.

As the Ninth Circuit said:

"Generally, a shareholder does not have standing to redress an injury to the corporation in which it holds stock. *Shell Petroleum, N.V. v. Graves,* 709 F.2d 593, 595 (9th Cir.), *cert denied,* 104 S.Ct. 537 (1983); *Sherman v. British Leyland Motors, Ltd.,* 601 F.2d 429, 439-40 (9th Cir. 1979) (sole shareholder had no standing to assert either federal or state law claims); *Von Brimer v. Whirlpool Corp.,* 536 F.2d 838, 846 (9th Cir. 1976) (majority shareholder may not assert state law claims despite economic injury to him); *Er-*

lich v. Glasner, 418 F.2d 226 (9th Cir. 1969) (sole shareholder could not maintain an action under 41 U.S.C. § 1983).

"To have standing to maintain an action, a shareholder must assert more than personal economic injury resulting from a wrong to the corporation. *Von Brimer v. Whirlpool*, 536 F.2d at 846. A shareholder must be injured directly and independently of the corporation. *Id.; Erlich v. Glasner*, 418 F.2d at 228; *Graves*, 709 F.2d at 595." (*Capitol Industries-EMI, Inc. v. Bennett, supra*, EMI's App. A-6 to A-7.)

The Ninth Circuit's ruling without any doubt is correct and applicable here where EMI is claiming potential injury from proposed California tax assessments against Capitol, its American corporate subsidiary.[2]

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2. Stockholders have been denied relief in such actions either on the ground that they lacked "standing" or that the corporation was the "real party in interest" under rule 17(a), Federal Rules of Civil Procedure. If it is found that a stockholder complaining of injury to a corporation meets the technical requirements of standing but does not satisfy the real party in interest rule, it would appear that the prohibition contained in 28 U.S.C. section 1341 could still provide a basis for dismissal of actions of this kind. For example, it is clear in the present case that Capitol has a "plain, speedy and efficient" remedy in the state courts. Hence, its joinder as the real party in interest would oust this Court of jurisdiction. Moreover, the recent decisions in *Fair Assessment in Real Estate v. McNary* (1981) — U.S. — [70 L.Ed.2d 271], *Rosewell v. LaSalle National Bank* (1981) 450 U.S. 503, reh. den. (1981) — U.S. — and *California v. Grace Brethren Church* (1982) — U.S. —, 73 L.Ed.2d 93, emphasized the strong policy against federal interference with the fiscal operations of a state. If a state provides an adequate remedy for challenge of a tax assessment, there is no apparent reason why section 1341 should not bar a federal action by an "interested nontaxpayer" as well as the taxpayer directly concerned. It is incongruous to suggest that a state can avoid the disruptive effect of federal injunctive relief in such cases by opening up its tax proceedings to interested third parties—a cure likely to be as disruptive as the ailment.

Therefore, in light of the nature of EMI's interest in Capitol, EMI cannot truly show any injury. Nor can EMI show that the relief it seeks will correct the matter. Nor is an adjudication in this case necessary because Capitol will be the best proponent of its own rights regarding the applicability to it of the unitary method of taxation. Finally, there is no obstacle to Capitol asserting its rights before the California court. Moreover, Capitol can raise in the California court all of the defenses that EMI seeks to raise here, including challenges to the constitutionality of the unitary method of taxation.

C. The Most Recent United States Supreme Court Decisions Confirm That EMI Has No Standing

In the last few years there have been several major decisions involving the question of standing. However, in none of these cases has this Court expanded the standing doctrine to a person such as EMI, which was indirectly affected by some governmental action, or where the directly affected person had a remedy in the state courts, or where that person was actually litigating the identical issues against the same defendant in the state courts.

The doctrine of standing was succinctly summarized in *Simon v. Eastern Ky. Welfare Rights Org.* (1976) 426 U.S. 26 [48 L.Ed.2d 450, 96 S.Ct. 1917]. This Court stated:

> "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. See *Flast v. Cohen,* 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947, 959 (1968). The concept of standing is part of this limitation. Unlike other associated doctrines, for example, that which restrains federal courts from de-

> ciding political questions, standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' *Id.*, at 99, 88 S.Ct., at 1952, 20 L.Ed.2d at 961.
>
> As we reiterated last Term, the standing question in its Art. III aspect 'is whether the plaintiff has "alleged such a personal stake in the controversy" as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' *Warth v. Seldin,* 422 U.S. 490, 498-499, 95 S.Ct. 219, 2205, 45 L.Ed.2d 343, 354 (1975) (emphasis in original). In sum when a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." (426 U.S. at pp. 37-38.)

In the *Eastern Ky.* case, several indigents and organizations brought suit against the Secretary of Treasury and Internal Revenue Service Commissioner, challenging a Revenue Ruling which granted favorable tax treatment to a nonprofit hospital. This Court rejected the challenge and set forth as a standing prerequisite the need for the plaintiff to show "an injury to himself that is likely to be redressed by a favorable decision." Here not only is EMI's purported injury speculative, there is absolutely no assurance of redress. Even if this Court should rule that the unitary tax as applied to Capitol is unconstitutional, there is absolutely no assurance that Capitol will declare a larger dividend to EMI or that its value in the Capitol stock will be enhanced. Moreover, in a concurring opinion, Justice Stewart expressed the applicable maxim of tax law in the following words:

> "I add only that I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." (*Id.*, at 46.)

The *Eastern Ky.* decision was cited as controlling authority in *American Soc. of Travel Agents, Inc. v. Blumenthal* (D.C. Cir. 1977) 566 F.2d 145, cert. den. (1978) 435 U.S. 947, 98 S.Ct. 1533, where it was held that an association of travel agents and individual travel agencies had no standing to complain of the failure of federal tax authorities to assess taxes on certain income received by tax-exempt organizations, even though the organizations were in competition with plaintiffs. Similarly, in *Kent v. Northern Cal. Reg. Off. of Amer. Friends Services, Com.* (9th Cir. 1974) 497 F.2d 1325, a group of taxpayers objecting to the federal tax on telephone services placed their tax payments into a trust pending a determination of the legality of the tax. The trustee filed an interpleader action to settle adverse claims to the fund and also sought injunctive relief. Relying on the earlier opinion in *Flast v. Cohen* (1968) 392 U.S. 83 [20 L.Ed.2d 947, 88 S.Ct. 1942], the Ninth Circuit Court of Appeals held that the trustee had standing to assert an interpleader action, but had no standing to enjoin the collection of taxes from the taxpayer themselves.

The next major standing case decided by this Court was *Duke Power Co. v. Carolina Env. Study Gp.* (1978) 438 U.S. 59, where it extended standing to an environmental organization, a labor union, and a number of residents near certain planned nuclear plants. It was not difficult for this Court to find standing in *Duke Power* because the case involved "the question of whether Congress may, con-

sistent with the Constitution, impose a limitation on liability for nuclear accidents resulting from the operation of private nuclear power plants licensed by the Federal Government." (*Id.*, at pp. 62-63.) There is no analogy between the interests of the various plaintiffs in *Duke Power*, where the threatened nuclear injury was pervasive and compensation for damages from injury would have been unconstitutionally circumscribed, and the interest of EMI, a foreign corporation, which seeks to overthrow the sovereign taxation power of the State of California.

Duke Power was followed by *Bryant v. Yellen* (1980) 447 U.S. 352, where the United States government filed a declaratory relief action to ascertain whether section 46 of a particular law applied to leased lands. There when the district court ruled against the United States, the latter forewent an appeal of that adverse decision. Thereupon certain persons intervened to press an appeal on their own behalf because that case was the only vehicle now available to them to have determined the question of the applicability of section 46. If section 46 applied, then the intervenors would have the possibility of purchasing certain lands. This Court extended standing to the intervenors on appeal because, if they prevailed on their contention that section 46 of the law applied, they would have the possibility of purchasing the land. On the other hand, if the adverse decision was not appealed by the intervenors in light of the United States government's failure to do so, the intervenors would never have the possibility of purchasing the land.

Obviously, the facts in *Bryant v. Yellen, id.*, are completely dissimilar from those in this lawsuit. Here Capitol

is capable of asserting its legal rights in the state court. To date it has pursued every possible administrative procedure available, and if it fails in those efforts, it can pay the tax and file a suit for refund in the state court.

The next case, *Maryland v. Louisiana* (1981) 451 U.S. 725 [68 L.Ed.2d 576], is *sui generis* and clearly distinguishable. There, various states sued the State of Louisiana requesting a declaration that Louisiana's "first-use" tax was unconstitutional. This Court accepted original jurisdiction and found that the plaintiff states had standing because "The plaintiff States are substantial consumers of natural gas. . . . It is clear that the plaintiff States, as major purchasers of natural gas whose cost has increased as a direct result of Louisiana's imposition of the First-Use Tax, are directly affected in a 'substantial and real' way so as to justify their exercise of this Court's original jurisdiction." (*Id.*, at pp. 736-737.)

This Court also went on to find a second and alternate basis for standing in these words:

> "Jurisdiction is also supported by the State's interest as *parens patriae*. A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens. ([Citations.] But it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." (*Id.*, at 590.)

This Court then pointed out another factor favoring standing, namely, that "individual consumers . . . are foreclosed from suing for refund in Louisiana's courts." (*Id.*, at p. 591.) However, in the case of EMI, not only was the tax assessed against Capitol, the latter can still file

a suit for refund in the state court. This case is similar to *Arizona v. New Mexico* (1976) 425 U.S. 794, 797, where this Court refused federal standing and held:

> "[I]n the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated." (Emphasis in original.)

Then, very recently in its decision in *Valley Forge College v. Americans United* (1982) — U.S. — [70 L.Ed.2d 700], this Court reiterated the rule that "[t]he exercise of judicial power . . . is . . . restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the Court adjudicate." (*Id.*, at p. 710.) This Court also made clear that "injury in fact" must consist of something more than the invasion of an "individuated right" or "personal constitutional right" to a governmental observance of the Constitution. Rejecting the motion that mere allegation of a legal right is sufficient to confer standing, the court stated ". . . assertion of a right to a particular kind of government conduct, which the government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." (*Id.*, at p. 717.)

The *Valley Forge* case involved a claim by citizens and taxpayers of the United States that the government's conveyance of surplus property to a college operated by a religious order violated the Establishment Clause. Clearly, no less exacting standards for determining the standing of a litigant can apply in actions brought by a foreign corporation, such as EMI, which seeks to advance the rights of its domestic subsidiary. Here the proposed assessments to which EMI objects are directed against Capitol, which

is a domestic corporation doing business in California. The FTB has no jurisdiction to assert any tax or other demands against EMI and has not done so.

Stripped down to its essentials, the complaint filed by EMI shows that it is merely a concerned by stander in a pending controversy between the FTB and Capitol. It is evident that EMI has an interest in the final outcome of that controversy. This admitted interest, however, will not suffice insofar as standing is concerned. " '[T]hat concrete adverseness which sharpens the presentation of issues,' *Baker v. Carr,* 369 U.S. [186] at 204, is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself." (*Valley Forge College v. Americans United, supra,* 70 L.Ed.2d 718.)[3]

No palpable "injury in fact" to EMI has been alleged in this action. Its only claim is that the proposed assessments, if allowed to stand, will result in a dimunition in value of its shareholding interest in Capitol.

II

There Is No Need To Address The Merits Of EMI's Claim As It Has No Standing In The First Instance

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3. In the just concluded term, the United States Supreme Court held that parents of Black public school children lacked standing in an action which alleged that the IRS had not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. (*Allen v. Wright* (1984) — U.S. — [82 L.Ed.2d 1].) Although the facts of the case are distinguishable from those here, the *Allen* decision demonstrates the Supreme Court's reluctance to find standing, even though injuries caused by racial discrimination may have been present.

EMI's discussion of the merits of its action are totally inappropriate and irrelevant. Despite the fact that EMI admits that "Because the briefs below were on the issue of standing to sue and the propriety of the dismissal of the complaint on that ground, the merits of the case were not briefed" (EMI's Petn., p. 15), it spends half of its petition arguing about the merits of the case. EMI uses the case of *Montana v. United States* (1979) 440 U.S. 147, 163-164, to justify its discussion of the merits of the case, apparently on its conjecture that Capitol may be precluded from raising certain issues in a subsequent California state court action.

First, if Capitol is precluded from raising those issues, then it was occasioned only by EMI's abortive action here and there is no need for this Court to rescue EMI from its improvident conduct. Second, EMI's speculative reference to *Montana v. United States, id.,* is ambiguous and vague and deserves no attention whatsoever from this Court. Third, the United States Supreme Court's recent decisions, *Limbach v. Hooven & Allison Co.* (1984) — U.S. —, 104 S.Ct. 1837 and *U.S. v. Stauffer Chemical Co.* (1984) — U.S. —, 104 S.Ct. 575, cast doubt on EMI's interpretation of *Montana v. United States, supra.*

CONCLUSION

In summary, EMI has completely failed to establish that it has standing to sue. The demand for information issue is nonexistent. EMI has not cited a single authority that EMI can prevent FTB from assessing a tax against Capitol, which is a domestic corporation doing business in California. Thus, we respectfully submit that

EMI's action is totally devoid of merit and that the petition should be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General

EDWARD P. HOLLINGSHEAD
Deputy Attorney General
COUNSEL OF RECORD

CHARLES C. KOBAYASHI
Deputy Attorney General

Attorneys for Respondents